JUDICATURE COMMISSION.

FIRST REPORT

OF

THE COMMISSIONERS.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY GEORGE EDWARD EYRE AND WILLIAM SPOTTISWOODE,
PRINTERS TO THE QUEEN'S MOST EXCELLENT MAJESTY,
FOR HER MAJESTY'S STATIONERY OFFICE.

1869.

[*Price 4d.*]

Digitized with financial assistance from

Shri Brihad Bhartiya Samaj

on 24 February, 2020

COMMISSION.

VICTORIA R.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to Our right trusty and well-beloved Councillor Hugh MacCalmont Baron Cairns,[1] a Judge of Our Court of Appeal in Chancery; Our right trusty and well-beloved Councillor Sir William Erle, Knight; Our right trusty and well-beloved Councillor Sir James Plaisted Wilde, Knight, Judge of Our Court of Probate and Judge Ordinary of the Court for Divorce and Matrimonial Causes; Our trusty and well-beloved Sir William Page Wood,[2] Knight, a Vice Chancellor; Our trusty and well-beloved Sir Colin Blackburn, Knight, One of the Justices of Our Court of Queen's Bench; Our trusty and well-beloved Sir Montague Edward Smith, Knight, One of the Justices of Our Court of Common Pleas; Our trusty and well-beloved Sir John Burgess Karslake, Knight,[3] Our Attorney General; Our trusty and well-beloved Sir Roundell Palmer, Knight; Our trusty and well-beloved William Milbourne James,[4] Esquire, One of Our Counsel learned in the Law, Vice Chancellor of Our County Palatine of Lancaster; Our trusty and well-beloved John Richard Quain, Esquire, One of Our Counsel learned in the Law; Our trusty and well-beloved Henry Cadogan Rothery, Esquire, Registrar of Our High Court of Admiralty of England; Our trusty and well-beloved Acton Smee Ayrton, Esquire; Our trusty and well-beloved George Ward Hunt,[5] Esquire; Our trusty and well-beloved Hugh Culling Eardley Childers,[6] Esquire; Our trusty and well-beloved John Hollams, Esquire; and Our trusty and well-beloved Francis Dobson Lowndes, Esquire, Greeting.

Whereas We have deemed it expedient for divers good causes and considerations that a Commission should forthwith issue to inquire into the operation and effect of the present constitution of Our High Court of Chancery of England, Our Superior Courts of Common Law at Westminster, Our Central Criminal Court, Our High Court of Admiralty of England, the Admiralty Court of Our Cinque Ports, Our Courts of Probate and of Divorce for England, the Courts of Common Pleas of Our Counties Palatine of Lancaster and of Durham respectively, and the Courts of Error and of Appeal from all the said several Courts.

Now know ye, that We, reposing great trust and confidence in your zeal, discretion, and integrity, have authorized and appointed you the said Hugh MacCalmont Baron Cairns, Sir William Erle, Sir James Plaisted Wilde, Sir William Page Wood, Sir Colin Blackburn, Sir Montague Edward Smith, Sir John Burgess Karslake, Sir Roundell Palmer, William Milbourne James, John Richard Quain, Henry Cadogan Rothery, Acton Smee Ayrton, George Ward Hunt, Hugh Culling Eardley Childers, John Hollams, and Francis Dobson Lowndes, or any six or more of you, to make diligent and full inquiry into the operation and effect of the present constitution of Our High Court of Chancery of England, Our Superior Courts of Common Law at Westminster, Our

[1] Lord Cairns ceased to be Judge of the Court of Appeal in Chancery upon being appointed Lord Chancellor.
[2] Raised to the Peerage as Lord Hatherley, upon being appointed Lord Chancellor in the place of Lord Cairns.
[3] One of Her Majesty's Counsel.
[4] Now Sir William Milbourne James, Knight, a Vice Chancellor.
[5] Now the Right Honourable George Ward Hunt.
[6] Now the Right Honourable Hugh C. E. Childers.

By a Royal Warrant under Her Majesty's Sign Manual, dated 22d October 1867, the Right Honourable Sir Robert Joseph Phillimore, Knight, Judge of Her Majesty's High Court of Admiralty, Sir George William Wilshere Bramwell, Knight, one of the Barons of Her Majesty's Court of Exchequer, and William Gandy Bateson, Esquire, were added to the Commission.

By a further Royal Warrant, under Her Majesty's Sign Manual, dated 25th January 1869, Sir Robert Porrett Collier, Knight, Her Majesty's Attorney General, and Sir John Duke Coleridge, Knight, Her Majesty's Solicitor General, were added to the Commission.

Central Criminal Court, Our High Court of Admiralty of England, the Admiralty Court of Our Cinque Ports, Our Courts of Probate and of Divorce for England, the Courts of Common Pleas of Our Counties Palatine of Lancaster and of Durham respectively, and the Courts of Error and of Appeal from all the said several Courts, and into the operation and effect of the present separation and division of jurisdictions between the said several Courts, and also into the operation and effect of the present arrangements for holding the sittings in London and Middlesex, and the holding of sittings and assizes in England and Wales, and of the present division of the legal year into terms and vacations, and generally into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in Chambers, with a view to ascertain whether any and what changes and improvements,—either by uniting and consolidating the said Courts or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of Judges in the said Courts, or any of them, or empowering one or more Judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts or any of them, or of the sittings and assizes, is now distributed or conducted, or otherwise,—may be advantageously made so as to provide for the more speedy, economical, and satisfactory dispatch of the judicial business now transacted by the same Courts, and at the sittings and assizes respectively, and further to make inquiry into the Laws relating to Juries, especially with reference to the qualification, summoning, nominating, and enforcing the attendance of Jurors, with a view to the better, more regular, and more efficient conduct of Trials by Jury, and the attendance of Jurors at such Trials.

And for the better discovery of the truth in the premises We do by these Presents give and grant to you, or any six or more of you, full power and authority to call before you, or any six or more of you, such and so many of the officers and clerks of Our said Courts, and all such other persons as you shall judge necessary, by whom you may be informed of the truth in the premises, and to inquire of the premises by all other lawful ways and means whatsoever.

And We do hereby give and grant unto you, or any six or more of you, full power and authority to cause all or any of the officers and clerks of any of Our said Courts to bring and produce before you, or any six or more of you, all rolls, records, orders, books, papers, or other writings belonging to any of Our said Courts, or to any of the officers within the same.

And Our further will and pleasure is that you do within nine calendar months after the date of this Our Commission, or as soon as the same can conveniently be done, (using all diligence,) certify unto Us in Our Court of Chancery, under the hands and seals of you, or any six or more of you, what you shall have done in the premises.

And We further will and command that this Our Commission shall continue in full force and virtue, and that you Our said Commissioners, or any six or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment.

And for your assistance in the due execution of this Our Commission We have made choice of Our trusty and well-beloved Thomas Joseph Bradshaw, Esquire, Barrister-at-Law, to be Secretary to this Our Commission, and to attend you, whose services and assistance We require you to use from time to time as occasion shall require.

Given at Our Court at Saint James's the Eighteenth day of September One thousand eight hundred and sixty-seven, in the Thirty-first Year of Our Reign.

By Her Majesty's Command.

GATHORNE HARDY.

FIRST REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, Your Majesty's Commissioners, whose hands and seals are hereunto set, having been appointed by Your Majesty to inquire into the operation and effect of the present constitution of the High Court of Chancery of England, the Superior Courts of Common Law at Westminster, the Central Criminal Court, the High Court of Admiralty of England, the Admiralty Court of the Cinque Ports, the Courts of Probate and of Divorce for England, the Courts of Common Pleas of the Counties Palatine of Lancaster and of Durham respectively, and the Courts of Error and of Appeal from all the said several Courts; and into the operation and effect of the present separation and division of jurisdictions between the said several Courts; and also into the operation and effect of the present arrangements for holding the sittings in London and Middlesex, and the holding of Sittings and Assizes in England and Wales, and of the present division of the legal year into terms and vacations, and generally into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in Chambers, with a view to ascertain whether any and what changes and improvements,—either by uniting and consolidating the said Courts or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of Judges in the said Courts, or any of them, or empowering one or more Judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts or any of them, or of the sittings and assizes, is now distributed or conducted, or otherwise, —may be advantageously made so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the same Courts, and at the Sittings and Assizes respectively; and further to make inquiry into the laws relating to juries, especially with reference to the qualification, summoning, nominating, and enforcing the attendance of jurors, with a view to the better, more regular, and more efficient conduct of Trials by Jury, and the attendance of jurors at such trials, do most humbly submit to Your Majesty this our First Report.

Introductory Observations.

In commencing the inquiry which we were directed by Your Majesty to make, the first subject that naturally presented itself for consideration was the ancient division of the Courts, into the Courts of Common Law, and the Court of Chancery, founded on the well known distinction in our law between Common Law and Equity.

This distinction led to the establishment of two systems of Judicature, organized in different ways, and administering justice on different and sometimes opposite principles, using different methods of procedure, and applying different remedies. Large classes of rights, altogether ignored by the Courts of Common Law, were protected and enforced by the Court of Chancery, and recourse was had to the same Court for the purpose of obtaining a more adequate protection against the violation of Common Law rights than the Courts of Common Law were competent to afford. The Common Law Courts were confined by their system of procedure in most actions, — not brought for recovering the possession of land,—to giving judgment for debt or damages, a remedy which has been found to be totally insufficient for the adjustment of the complicated disputes of modern society. The procedure at Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of important cases frequently occur in the practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial; and ultimately those cases either find their way into the Court of Chancery, or the Suitors in the Courts of

Common Law are obliged to have recourse to private arbitration in order to supply the defects of their inadequate procedure.

The evils of this double system of Judicature, and the confusion and conflict of jurisdiction to which it has led, have been long known and acknowledged.

The subject engaged the attention of the Commissioners appointed in 1851 to inquire into the constitution of the Court of Chancery. Those learned Commissioners, after pointing out some of the defects in the administration of justice arising out of the conflicting systems of procedure and modes of redress adopted by the Courts of Common Law and Equity respectively, state their opinion, that "a practical and effectual remedy "for many of the evils in question may be found in such a transfer or blending of "jurisdiction, coupled with such other practical amendments, as will render each Court "competent to administer complete justice in the cases which fall under its cognizance."

In like manner the Commissioners appointed in 1850 to inquire into the constitution of the Common Law Courts make, in their Second Report, a very similar recommendation. They report that "it appeared to them that the Courts of "Common Law, to be able satisfactorily to administer justice, ought to possess in all "matters within their jurisdiction the power to give all the redress necessary to protect "and vindicate Common Law rights, and to prevent wrongs, whether existing or likely "to happen unless prevented;" and further that "a consolidation of all the elements "of a complete remedy in the same Court was obviously desirable, not to say im-"peratively necessary, to the establishment of a consistent and rational system of "procedure."

In consequence of these Reports several Acts of Parliament have been passed for the purpose of carrying out to a limited extent the recommendations of the Commissioners.

By virtue of these Acts the Court of Chancery is now, not only empowered, but bound to decide for itself all questions of Common Law without having recourse, as formerly, to the aid of a Common Law Court, whether such questions arise incidentally in the course of the suit, or constitute the foundation of a suit, in which a more effectual remedy is sought for the violation of a common law right, or a better protection against its violation than can be had at Common Law. The Court is further empowered to take evidence orally in open Court, and in certain cases to award damages for breaches of contract or wrongs as at Common Law; and Trial by Jury,—the great distinctive feature of the Common Law,—has recently, for the first time, been introduced into the Court of Chancery.

On the other hand, the Courts of Common Law are now authorized to compel discovery in all cases, in which a Court of Equity would have enforced it in a suit instituted for the purpose. A limited power has been conferred on Courts of Common Law to grant injunctions, and to allow equitable defences to be pleaded, and in certain cases to grant relief from forfeitures. These changes, however, fall far short of the recommendations of the Common Law Commissioners, who in their Final Report expressed the opinion, that power should be conferred on the Common Law Courts "to give, in respect of rights there recognized, all the protection and redress which "at present can be obtained in any jurisdiction."

The alterations, to which we have referred, have no doubt introduced considerable improvements into the procedure both of the Common Law and Equity Courts; but, after a careful consideration of the subject, and judging now with the advantage of many years experience of the practical working of the systems actually in force, we are of opinion that "the transfer or blending of jurisdiction" attempted to be carried out by recent Acts of Parliament, even if it had been adopted to the full extent recommended by the Commissioners, is not a sufficient or adequate remedy for the evils complained of, and would at best have mitigated but not removed the most prominent of those evils.

The authority now possessed by the Court of Chancery to decide for itself all questions of Common Law has no doubt worked beneficially. But the mode of taking evidence orally before an Examiner, instead of before the Judge who has to decide the case, has justly caused much dissatisfaction; and Trial by Jury,—whether from the reluctance of the Judge or of the Counsel to adopt such an innovation, or from the complexity of the issues generally involved in the suit, or because the proceedings in Chancery do not give rise to so many conflicts of evidence as proceedings in other Courts,—has been attempted in comparatively few cases.

In the Common Law Courts the power to compel discovery has been extensively used, and has proved most salutary; but the jurisdiction conferred on those Courts to grant injunctions and to allow equitable defences to be pleaded has been so limited and restricted,—the former extending only to cases where there has been an actual violation

of the right, and the latter being confined to those equitable defences where the Court of Chancery would have granted a perpetual and unconditional injunction,—that these remedies have not been of much practical use at Common Law, and Suitors have consequently been obliged to resort to the Court of Chancery, as before, for the purpose of obtaining a complete remedy.

Much therefore of the old mischief still remains, notwithstanding the changes which have been introduced; and the Court of Chancery necessarily continues to exercise the jurisdiction of restraining actions at law on equitable grounds, and even claims to exercise that jurisdiction in cases where an equitable defence might be properly pleaded at Common Law.

It may be further observed, in illustration of the evils of the double procedure, that whenever a new class of business arises, such as the litigation arising out of railway and other joint stock companies, proceedings, frequently of an experimental character, are commenced both at Law and in Equity by different suitors, leading to the inconvenience of protracted litigation, and the danger of conflicting judgments. We may refer to the litigation lately pending between the sellers of railway shares and the jobbers on the Stock Exchange, by which the sellers sought to obtain an indemnity from the jobbers against calls. The litigation began in a Court of Common Law. A suit in Equity soon followed, by a different plaintiff against the same defendants, both suits asking for similar redress. The Court of Common Law decided in favour of the plaintiff. The Court of Equity shortly after delivered judgment to the same effect. The defendants appealed in both suits; in the one case to the Exchequer Chamber, in the other to the Court of Appeal in Chancery. Both appeals were pending at the same time, but there was no official machinery by which the Judges of Appeal in Chancery and the Court of Exchequer Chamber could enter into communication with the view of arriving at a common result. The Court of Exchequer Chamber reversed the judgment of the Court below; the Court of Appeal in Chancery, acting independently of the Court of Exchequer Chamber, arrived at the same conclusion, and about the same time delivered its judgment, reversing the decision of the Vice-Chancellor. The Defendants were thus subjected to litigation (at the instance, no doubt, of different parties), carried on at the same time in different Courts, and exposed to the risk of conflicting decisions, those Courts operating under different forms of procedure, and being controlled by different Courts of Appeal.

The litigation arising out of Joint Stock Companies has constituted a very large proportion of the business which has engaged the attention of Courts of Law and Equity for some years. Directors of Joint Stock Companies fill the double character of agents and trustees for the companies and shareholders; and the effect of their acts and representations has frequently been brought into question in both jurisdictions, and sometimes with opposite results. The expense thus needlessly incurred has been so great, and the perplexity thereby occasioned in the conduct of business so considerable, as to convince most persons, who have followed the development of this branch of the law, of the necessity that exists for a tribunal invested with full power of dealing with all the complicated rights and obligations springing out of such transactions, and of administering complete and appropriate relief, no matter whether the rights and obligations involved are what are called legal or equitable.

We may refer also to the present condition of the High Court of Admiralty. A conflict, bearing some analogy to that which has so long existed between the Court of Chancery and the Courts of Common Law, seems likely to arise, if it has not already arisen, between the latter Courts and the Court of Admiralty. From ancient times the Courts of Common Law exercised a jealous supervision over the jurisdiction of the Court of Admiralty, and by the issuing of frequent writs of prohibition took pains to confine the jurisdiction of that Court within the narrowest limits. The consequence was, that, except in time of war, when it sat as a Prize Court, there was very little business in the Court of Admiralty until its jurisdiction was extended by recent legislation. Now, however, by virtue of several Acts of Parliament, the first of which was passed so lately as 1840, but more especially by the Admiralty Court Act, 1861, the jurisdiction of the Court has been extended to a variety of cases, which had been theretofore considered as exclusively cognizable in Courts of Common Law. As the Court of Chancery, chiefly by means of its power of granting injunctions for threatened as well as actual injuries, has extended its jurisdiction over a large class of cases properly cognizable in Courts of Common Law, the Court of Admiralty, assisted by the recent legislation above mentioned, and enjoying the peculiar advantage of a Court enforcing the law of maritime lien by proceedings in rem, might be expected, if this system were

continued, to extend its jurisdiction over many kinds of litigation relating to ships or cargoes, in respect of which the Courts of Common Law have a concurrent jurisdiction, but are not able to afford such convenient redress. The cause of this is manifestly the imperfection of the Common Law system, and the consequent necessity of seeking for a more complete remedy elsewhere.

Not only are the procedure of and the remedies administered by the Courts of Common Law and the Court of Admiralty different, but sometimes the redress to be obtained is regulated by different and conflicting principles. Thus in a collision suit the damages are, in some cases, assessed on one principle in a Court of Common Law, and on an entirely different principle in the Court of Admiralty. At Common Law, if both parties are found to be in fault, the Plaintiff fails. In the Court of Admiralty, the Plaintiff, under exactly similar circumstances, is entitled to recover half his damages from the Defendant; and there being generally in such cases a cross suit, the Defendant is also entitled to recover half his damages from the Plaintiff. This anomaly, if our recommendations are adopted, will require to be corrected by legislation.

The Court of Admiralty, even with the extended jurisdiction conferred on it by recent enactments, still labours under the same defect as the other Courts. It cannot, in many cases, give a complete remedy; the suitor may obtain one portion of his redress in the Court of Admiralty, but he must go into a Court of Common Law, or it may be into the Court of Chancery, for the rest. The Court of Admiralty has jurisdiction over a claim for damage to cargo, where the owner is not domiciled in England, but it has no jurisdiction over the claim of the shipowner for the freight due in respect of the same cargo; the shipowner must proceed for that in a Court of Common Law. It seems plain that these are counter claims, which ought to be capable of being set off against each other in the same suit. In the same way, the jurisdiction of the Court of Admiralty over claims for necessaries supplied to a ship is restricted to the case of a foreign ship, and to that of a British ship where there is not any owner domiciled in England; but if it happens that for some other cause the ship is under arrest, or that the proceeds thereof are in Court, then the Court exercises jurisdiction over all claims for building, equipping, or repairing the ship. All these claims may at the same time be litigated by a different procedure in a Court of Common Law; and hence it may happen not unfrequently that litigation may be proceeding simultaneously in the Court of Admiralty and at Common Law for the adjustment of disputes arising out of the same transaction, between the same parties or those who are liable to indemnify them. The conflict of judicial decisions, which may be thus occasioned, is made more perplexing, by the want of a Common Court of Appeal, as the appeal from the Court of Admiralty is to the Privy Council, and from the Common Law Courts to the Exchequer Chamber and the House of Lords.

The present state of the County Courts may also be appropriately referred to, as exhibiting the strange working of a system of separate jurisdictions, even when exercised by the same Court.

The County Court has jurisdiction in Common Law cases, up to 50*l.* in contracts, and to 10*l.* in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed 500*l.*, and in at least one of such cases, namely an administration suit, it is now competent for any County Court Judge to restrain the prosecution of actions brought by creditors in any of the Superior Courts of Common Law. By an Act of Parliament of last session some of the County Courts have also been invested with Admiralty jurisdiction in a large class of cases, where the amount in dispute does not exceed, in some cases 150*l.* and in others 300*l.* There is an appeal in each class of cases, within certain limits, to a Court of Common Law, to the Court of Chancery, or to the Court of Admiralty. But these jurisdictions, though conferred on the same Court and the same Judge, still remain (like the Common Law and Equity sides of the old Court of Exchequer) quite distinct and separate. The Judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished, under the County Court system, by three distinct suits brought in the same Court and before the same Judge, carried on under three different forms of procedure, and controlled by three different Courts of Appeal. In this case, therefore, although we appear at first sight to have obtained that great desideratum, which the Common Law Commissioners call "the con-" solidation of all the elements of a complete remedy in the same Court," yet, as that remedy can only be had in three separate suits, the evil is equally great.

We are of opinion that the defects above adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the Courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, into one Court, to be called "Her Majesty's Supreme Court," in which Court shall be vested all the jurisdiction which is now exercisable by each and all the Courts so consolidated.

This consolidation would at once put an end to all conflicts of jurisdiction. No suitor could be defeated because he commenced his suit in the wrong Court, and sending the suitor from equity to law or from law to equity, to begin his suit over again in order to obtain redress, will be no longer possible.

The Supreme Court thus constituted would of course be divided into as many Chambers or Divisions as the nature and extent or the convenient despatch of business might require.

All suits, however, should be instituted in the Supreme Court, and not in any particular Chamber or Division of it; and each Chamber or Division should possess all the jurisdiction of the Supreme Court with respect to the subject-matter of the suit, and with respect to every defence which may be made thereto, whether on legal or equitable grounds, and should be enabled to grant such relief or to apply such remedy or combination of remedies as may be appropriate or necessary in order to do complete justice between the parties in the case before the Court, or, in other words, such remedies as all the present Courts combined have now jurisdiction to administer.

We consider it expedient, with a view to facilitate the transition from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer should for the present retain their distinctive titles, and should constitute so many Chambers or Divisions of the Supreme Court; and as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court.

We further recommend that in order to prepare for any changes that may hereafter be thought expedient in the constitution of these Chambers or Divisions of the Supreme Court, all future judicial and other appointments therein should be made subject to the possibility of such changes.

Between the several Chambers or Divisions of the Supreme Court so constituted it would be necessary to make such a classification of business as might seem desirable with reference to the nature of the suits and the relief to be sought or administered therein, and the ordinary distribution of business among the different Chambers or Divisions should be regulated according to such classification. For the same reason which induces us to recommend the retention for the present of the distinctive titles of the different Courts in their new character, as so many divisions of the Supreme Court, we think that such classification should in the first instance be made on the principle of assigning as nearly as practicable to those Chambers or Divisions such suits as would now be commenced in the respective Courts as at present constituted; with power, however, to the Supreme Court to vary or alter this classification in such manner as may from time to time be deemed expedient.

It should further be competent for any Chamber or Division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other Chamber or Division of the Court, if it appears that justice can thereby be more conveniently done in the suit; but except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular Chamber or Division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other Chamber or Division of the Court. When such transfer has been made, the Chamber or Division, to which the suit has been so transferred, will take up the suit at the stage to which it had advanced in the first Chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the Chamber or Division to which it was transferred.

From the consolidation of all the present Superior Courts into one Supreme Court, it follows, that all the Judges of those Courts will become Judges of the Supreme Court; and thus every Judge (with the exception of those who are to sit exclusively in the Appellate Court herein-after recommended), though belonging to a particular Division, will be competent to sit in any other Division of the Court, whenever it may be found convenient for the administration of justice.

Here arises an important and difficult question, as to the number of Judges who should ordinarily sit in each Chamber or Division of the Supreme Court. Hitherto the constitution of the Court of Chancery and of the Courts of Common Law, in this respect, has been entirely different. Each division of the Court of Chancery is presided over by a single Judge, who adjudicates on all matters as a Court of First Instance, except in the few cases when he sits as a Court of Appeal from the County Courts. In like manner, a single Judge administers justice in the Courts of Probate, Divorce, and Admiralty respectively. On the other hand, in the Sittings of the Courts of Common Law in Banc, the Court is ordinarily constituted of four Judges. The matters adjudicated upon by the single Judge in the Court of Chancery are in many instances as important as the business transacted before the four Judges in the Courts of Common Law; so that there would seem to be either a want of power in the Court of Chancery, or an excess of power in the Courts of Common Law; but it must be borne in mind that a considerable proportion of the business of the Courts of Common Law is transacted by one of the Judges sitting at Chambers; much of the business of these Courts also consists of the review of trials which have taken place before a Judge and Jury; they also review the decisions of the Judge sitting at Chambers; they are also empowered to decide various important matters, some of which involve questions of general public interest, on which their determination is in some cases final.

With a Court of Appeal such as we propose to recommend, common to all the Divisions of the Supreme Court, constantly sitting, and easy of access, we think that matters of great importance may properly, as now in the Court of Chancery, be intrusted to the jurisdiction in the first instance of a single Judge; but, having regard to the principles which have guided us in our previous recommendations, and to the importance of avoiding any too violent transition from the modes of conducting judicial business to which the public have been accustomed, and in which they may be presumed to place confidence, we think it will be advisable to authorize a single Judge to exercise the jurisdiction of the Supreme Court, in the despatch of all such business appropriated to the Divisions of the Queen's Bench, Common Pleas, and Exchequer respectively as by general orders, or by the special order of the Court, or the consent of the parties, may be remitted to him; and that all matters now disposed of in banco in those Courts shall be heard and determined by not more than three Judges. We also think that the Judges of each Division or Chamber in which there are several Judges should have power to sit in banco in two sub-divisions at the same time, with the assistance, whenever necessary, of a Judge or Judges from any other Division of the Court.

Procedure in the Supreme Court.

The next question that arises for consideration is that of the Procedure to be adopted in the Supreme Court as above constituted. We can only give a sketch in this Report of the leading principles of the system which we recommend, leaving for General Orders, or for a Code of procedure, as may appear most advisable, the fuller development and completion of the scheme proposed.

The present modes of procedure in the Court of Chancery, the Courts of Common Law, the Court of Admiralty, and the Courts of Probate and Divorce are in many respects different; the forms of pleading are different, the modes of trial and of taking evidence are different, the nomenclature is different, the same instrument being called by a different name in different Courts; almost every step in the cause is different. Each Court is confined to its own forms of procedure. Nor is this difference due entirely to the different nature of the cases which the Courts are called upon to try; for often the same question has to be tried, and the same remedy sought, by a totally different method, according as the proceeding is in the Court of Chancery, the Courts of Common Law, or the Court of Admiralty. This variety in procedure was originally due to causes connected with the origin and history of the different jurisdictions, and it has been influenced in more recent times by the almost complete isolation of the several Courts, and by the circumstance that in the Courts of Common Law the ordinary rule and practice is to refer the decision of disputed questions of fact to a jury, without any appeal except by way of reference to a new jury; whilst in the Court of Chancery the judge ordinarily, in the Courts of Divorce and Probate frequently, and in the Court of Admiralty invariably decides all questions of fact and law, subject to appeal.

We recommend, that as much uniformity should be introduced into the procedure of all the Divisions of the Supreme Court as is consistent with the principle of making the procedure in each Division appropriate to the nature of the cases, or classes of cases, which will be assigned to each; such uniformity would in our opinion be attended with

the greatest advantages, and after a careful consideration of the subject, we see no insuperable difficulty in the way of its accomplishment.

Much may be done at the very commencement of a suit to prevent unnecessary litigation, delay, and expense. In a considerable number of suits there is no substantial question as to the right of the plaintiff to, at least, some relief. Frequently the object of the defendant is to gain time; sometimes he only disputes part of the claim, or of the amount sought to be recovered. In other cases, such as administration suits, suits to take partnership accounts, suits for specific performance, and suits for foreclosure or redemption, it is often from the first known what order must be made upon the hearing of the cause. In many such suits, notwithstanding improvements recently introduced, the proceedings are still conducted as they are in suits involving a real question as to the plaintiff's right to relief. Considerable delay is thus caused, and useless costs are incurred.

All suits, we think, should be commenced by a document to be called a Writ of Summons, and these writs of summons should be issued from one office. In all cases in which the plaintiff seeks to recover a money demand, whether founded upon a legal or equitable right, the practice established by the Common Law Procedure Act, 1852, should we think be adopted and the Writ should be specially endorsed with the amount sought to be recovered, and in default of appearance the plaintiff should be allowed to sign judgment for it. Further, in all cases in which a special endorsement has been made on a writ, and the defendant has appeared, the plaintiff should be entitled, on affidavit verifying the cause of action, and swearing that in his belief there is no defence, to take out a summons to show cause why he should not be at liberty to sign judgment; upon which summons such order may be made as the justice of the case may require.

In like manner, in cases of ordinary account, as in the case of a partnership or executorship, or ordinary trust account, where nothing more is required in the first instance than an account, the Writ should be specially endorsed, and in default of appearance, or after appearance, unless the defendant shall satisfy a Judge that there is really some preliminary question to be tried, an order for the account, with all usual directions, should be forthwith made. The Judge should also be empowered at any time, on summary application in Chambers or elsewhere, to direct, if he think fit, any necessary inquiries or accounts, notwithstanding it may appear that there is some special or further relief sought, or some special matter to be tried, as to which it may be proper that the suit should proceed in the ordinary manner.

PLEADINGS.

When the Defendant enters an appearance, and the suit has to proceed further, the issues between the parties must be ascertained by pleading, or otherwise. The systems of pleading now in use, both at Common Law and in Equity, appear to us to be open to serious objections. Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts which lie behind them are seldom clearly discoverable. Equity pleadings, on the other hand, commonly take the form of a prolix narrative of the facts relied upon by the party, with copies or extracts of deeds, correspondence, and other documents, and other particulars of evidence, set forth at needless length. The best system would be one, which combined the comparative brevity of the simpler forms of Common Law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce.

We recommend that a short statement constructed on this principle, of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the Declaration, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply. The pleadings should not go beyond the Reply, save by special permission of a Judge; but the Judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit.

We think, that a defendant, having a right or claim against a plaintiff with reference to the subject matter of the suit, or arising out of the same transaction, which at present he cannot enforce without a separate or cross action or suit, should be at liberty

to bring forward such right or claim by his Answer, which, in that case, should have the same effect as if it were a Declaration in a cross action or suit, so as to enable the Court or a Judge to pronounce a final judgment between the parties with respect both to the original and to the cross demand. The same principle might, we think, be extended to the recovery of other demands of the defendant, capable of being set off against the plaintiff's demand, when the balance is in favour of the defendant. But a Judge should be empowered, on application by the plaintiff before trial, to refuse permission to allow such cross right or claim to be brought forward, if he shall be of opinion that it cannot conveniently be adjudicated upon in the case to be tried.

We think also, that the Court should have power to direct that any person not originally a party to the suit, but who may have such an interest in the subject matter thereof as to make his presence necessary or expedient to enable the Court to do complete justice, should be summoned to attend the further proceedings and be bound thereby; and that, with this view, the plaintiff should be at liberty to make any person, against whom he may conceive himself to be entitled to relief, a party defendant to the suit. And, on the other hand, that, where the defendant is or claims to be entitled to contribution or to indemnity or other relief over against any other person or persons, or where from any other cause it shall appear to the Court fit that a question in the suit should be determined, not only as between the plaintiff and defendant, but as between the defendant and any other person, the Court should have power to make such order as may be proper for the purpose of having the question so determined.

We think, that either party should be at liberty to apply at any time, either before or after pleading, for such order as he may upon the admitted facts in the case be entitled to, without waiting for the determination of any other questions between the parties.

MODE OF TRIAL.

With regard to the trial and determination of disputed questions of fact, the mode of trial varies according to the Court in which the litigation happens to be pending, without any sufficient power of adaptation to the requirements of particular cases.

In the Court of Chancery, until recently, the Judge had no power to summon a jury, whatever might be the conflict of evidence or dispute as to the facts; all questions of fact as well as of law were generally decided by the Judge. In some cases, it was the practice to send issues to be tried by a jury at Common Law. This course, however, was taken, not as a mode of trial, but merely for the assistance or information of the Court, which still reserved to itself the ultimate decision of the facts, and if dissatisfied with the first verdict might send the case before a second jury, or decide the facts according to its own view, and without regard to the verdict. Substantially the practice of the Court of Chancery remains unaltered; but there is now a power, which is rarely exercised, of summoning a jury, and the practice of sending issues to be tried at Common Law has become less frequent.

The Court of Admiralty, which decides for itself all questions of law and fact, may in special cases call in the assistance of nautical or mercantile assessors, but it has no power to summon a jury. The Court, however, by a recent statute has power to direct any question of fact arising in a suit to be tried in a Court of Common Law, and, if it thinks fit, to order a new trial; but the verdict of the jury, when final, is conclusive upon the Court. This power, we understand, has been exercised in only one instance.

In the Courts of Probate and Divorce application is made to the Judge in each case to fix the mode of trial, either before himself or by a jury. In the Probate Court, if the parties agree in asking for a jury, the application is usually granted; if they do not agree, the Judge fixes the mode of trial which he considers best adapted to the case; but in the case of an heir-at-law cited, or otherwise made party to the suit, a jury may be demanded as of right. A similar rule of practice exists in the Court of Divorce. In that court also, in cases of dissolution of marriage, either party may demand a jury as of right.

In the Courts of Common Law a jury has always been regarded as the constitutional tribunal for trying issues of fact; and the theory is, that all such questions are fit to be tried in that way. It has, however, long been apparent, in the practice of the Courts of Common Law, that there are several classes of cases litigated in those courts to which trial by jury is not adapted, and in which the parties are compelled—in many cases after they have incurred all the expense of a trial—to resort to private arbitration. Until the Common Law Procedure Act of 1854, the parties could not be compelled to go to arbitration, and the power given by that Act is limited to cases where the dispute relates wholly or in part to matters of mere account, or where the parties have themselves before action agreed in writing to refer the matter in difference to arbitration.

The system of arbitration which has thus been introduced, is attended with much inconvenience. The practice is to refer cases which cannot be conveniently tried in court either to a Barrister or to an Expert. A Barrister can seldom give that continuous attention to the case which is essential to its being speedily and satisfactorily disposed of; and an Expert, being unacquainted with the law of evidence, and with the rules which govern legal proceedings, allows questions to be introduced which have nothing to do with the matters at issue. In neither case has the Referee that authority over the practitioners and the witnesses which is essential to the proper conduct of the proceedings. If the barrister or solicitor who is engaged in the suit, or even a witness, has some other engagement, an adjournment is almost of course. The Arbitrator makes his own charges, generally depending on the number and length of the meetings, and the professional fees are regulated accordingly. The result is great and unnecessary delay, and a vast increase of expense to the suitors. The Arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgment, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the Arbitrator, unless he fails to decide on all the matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case.

In the Court of Chancery questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the chief clerk, but any party is entitled, if he think fit, to require that any question arising in the course of the proceedings shall be submitted to the Judge himself for decision. In such a case the decision of the Judge is given after he has been sitting in Court all day hearing causes. It has been represented to us that this system does not give satisfaction, and that there is not sufficient judicial power to dispose of the business in Court, and at the same time to give that personal attention to the business in Chambers which was contemplated when references to the Judge in Chambers were substituted for the old references to the Masters in Chancery.

In the Court of Admiralty references are always to the Registrar, assisted if necessary by one or two merchants or other skilled persons as assessors or advisers; the Registrar, from his knowledge of law, is enabled to regulate the conduct of the case; the merchants—assuming them to be properly chosen—have that practical knowledge which enables them to advise him on questions of a commercial nature that may arise in the course of the proceedings. The reference proceeds like a trial at law until it is concluded, without adjournment, except for special cause, and there is an appeal at once to the Judge in case the Registrar miscarries.

It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

We therefore recommend that great discretion should be given to the Supreme Court, as to the mode of trial, and that any questions to be tried should be capable of being tried in any Division of the Court.

(1.) By a Judge.
(2.) By a Jury.
(3.) By a Referee.

The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode. When the trial is to be by a Jury or by Referee, a Judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The Judge should also, on the application of either party have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

The system which, in all the Divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by Referees, is as follows:

OFFICIAL REFEREES.

We think that there should be attached to the Supreme Court officers to be called Official Referees, and that a Judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a Referee; and that whenever a cause is to be tried by a Referee, such trial should be by one of these

Official Referees, unless a Judge otherwise orders. We think, however, that a Judge should have power to order such trial to be by some person not an Official Referee of the Court, but who on being so appointed should *pro hâc vice* be deemed to be and should act as if he were an Official Referee. The Judge should have power to direct where the trial shall take place, and the Referee should be at liberty, subject to any directions which may from time to time be given by the Judge, to adjourn the trial to any place which he may deem to be more convenient.

The Referee should, unless the Judge otherwise direct, proceed with the trial in open Court, *de die in diem*, with power, however, to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the Court.

The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court, or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the Referee should have the same effect as a verdict at Nisi Prius, subject to the power of the Court to require any explanation or reasons from the Referee, and to remit the cause or any part thereof for reconsideration to the same, or any other Referee. The Referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.

In connection with the subject of trial, it seems proper to refer to the recommendation of the Patent Law Commissioners in their Report of the 29th July 1864, who, after observing, that the present mode of trying the validity of patents is not satisfactory, advise, that such trials should take place before a Judge, sitting with scientific assessors to be selected by himself in each case, but without a jury, unless at the desire of both parties to the suit; and that on such trials the Judge, if sitting without a jury, should decide questions of fact as well as of law. It appears to us that a plan similar in substance to that recommended by the Patent Law Commissioners, might with advantage be applied to the trial, not of Patent cases only, but of any cases involving questions of a scientific or technical character, in which the Judge, or the Referee by leave of the Judge, may think it desirable to have the aid, during the whole or any part of the proceedings, of scientific assessors.

EVIDENCE. As respects the mode of taking evidence at the trial, the practice of the Courts varies considerably. The rule in the Common Law Courts always was and still is that the evidence at the trial should be taken by oral examination of the witnesses in open Court. Formerly, in the Court of Chancery, the witnesses were examined and cross-examined on written interrogatories by an officer of the Court, in the absence of the parties and their legal advisers. At present the evidence in chief is taken, either by affidavit, or orally before an examiner generally in the absence of the opposite party, who has however the power of cross-examination at a later stage, in some cases orally before an examiner, and in others in open Court. In the Court of Admiralty the practice of examining the witnesses in open Court has been recently introduced, and is now in general use. In the Courts of Probate and Divorce the witnesses are also, examined in open Court. There can be no doubt that whenever there is a conflict of evidence the best way of extracting the truth is by oral examination of the witnesses in open Court, in the presence of the Judge or jury who have to decide the case; but there are often formal and collateral matters necessary to be proved in the course of a suit which can be conveniently proved by affidavit, and written evidence may sometimes be combined with oral evidence so as to save expense, and facilitate a speedy trial.

We recommend, for these reasons, that, in the absence of any agreement between the parties, and subject to any General Order of the Court applicable to any particular class of cases, the evidence at the trial should be by oral examination in open Court, but that the Court should have power at any time to direct that the evidence in any case, or as to any particular matter at issue, should be taken by affidavit, or that affidavits of any witnesses may be read at the trial, or that any witnesses may be examined upon interrogatories or otherwise before a commissioner or examiner. Any witness who may have made an affidavit should be liable to cross-examination in open Court, unless the Court or a Judge shall direct the cross-examination to take place in any other manner. Upon interlocutory applications, the evidence should, we think, as a general rule be taken by affidavit, but the Court or a Judge should upon the application of either party have power to order the attendance, for cross-examination or otherwise, of any person who may have made an affidavit.

The existing practice as to requiring admissions of written documents should, in our opinion, be continued. We think also, that a similar practice might with advantage be extended to the admission of certain facts as well as documents; and therefore we

recommend that if it be made to appear to the Judge, at or after the trial of any case, that one of the parties was a reasonable time before the trial required in writing to admit any specific fact, and without reasonable cause refused to do so, the Judge should either disallow to such party or order him to pay (as the case may be) the costs incurred in consequence of such refusal.

INCIDENTAL POWERS.

Some other incidental powers which the Court, in our opinion, ought to possess, may be conveniently mentioned in this place.

The Judge at the trial should, without consent of the parties, have power to reserve leave to the Court to enter a nonsuit or verdict, and when the Judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court, without motion for a rule nisi. Upon motion for a new trial the Court should have power, although no leave has been reserved at the trial, to order a nonsuit or verdict to be entered.

The time within which an application must be made for a new trial should be regulated by General Orders of the Supreme Court.

We recommend that every Order of a Judge at Chambers or at Nisi Prius should have the same force and effect as a rule of Court now has, and that a Judge sitting in Chambers or at Nisi Prius should have the same power to enforce, vary, or deal with any such order by attachment or otherwise as is possessed by the Court, but the Court should have power, upon application in a summary way, to enforce, vary, or discharge any such order.

We think that a Judge should have power, at any time after writ issued, upon being satisfied that the plaintiff has a good cause of action or suit, and that the defendant is about to leave, or is keeping out of the jurisdiction in order to avoid process, to order an attachment to issue against any property of the defendant which may be shown to be within the jurisdiction; such property to be released upon bail being given, and in default of bail to be dealt with, as a Judge may direct. This power, which is analogous to that now vested in the Court of Admiralty, may make the use of writs of Capias and Ne exeat regno by the Courts of Common Law and Chancery (which are sometimes used oppressively) less frequent. It may also render the retention of the process of foreign attachment in the Lord Mayor's Court in the City of London unnecessary.

COSTS.

In the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce, the Court has at present full power over the costs. We think that the absence of this power in the Courts of Common Law often occasions injustice, and leads to unnecessary litigation. We therefore recommend that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court.

GENERAL ORDERS.

Power should be vested in the Supreme Court to regulate from time to time by General Orders the procedure and practice in all its Divisions, and to make such changes in the duties of the several officers of the Court, as may from time to time be thought fit, and may be consistent with the nature of their appointments.

SITTINGS AND ASSIZES.

We now proceed to consider the present general arrangements for the conduct of judicial business.

The Sittings during Term are occupied, together with a portion of those after Term, in the Courts of Common Law, by business in Banco, Nisi Prius Sittings going on at the same time. Some descriptions of business in the Courts of Common Law can only be transacted during Term. In all other Courts there is practically no difference in the business done at the Sittings during and out of Term.

We think that, unless it should be thought right wholly to abolish the division of the legal year into Terms, there should be three instead of four Terms, commencing respectively on the 2nd November, 11th January, and 1st May in each year, the duration of each Term to be four weeks.

There may be some convenience in retaining such fixed periods with a view to the necessary times of vacation, which immediately precede the autumnal and winter Sittings of the Courts, and which it might be expedient in the spring to regulate, so as to coincide as nearly as possible with the Easter recess of Parliament. But we are of opinion that there should not be in any Division of the Court any distinction between the business capable of being transacted in or out of Term, and that all the Courts should have power to sit at any time, in or out of Term, for the despatch of any business.

With respect to the business of the Common Law Courts in Banco, it is unnecessary to add anything here to the recommendations in the previous part of our Report. For the despatch of such part of the present Chamber business of the Common Law Courts as requires to be transacted by a Judge, we think that one Judge at least should sit continuously during the legal year.

We have next to consider the arrangements for holding Sittings for the trial of causes in London and Middlesex, and for holding Assizes in other parts of England and Wales.

SITTINGS IN LONDON AND MIDDLESEX.

The system at present prevailing in London and Middlesex is, that each of the three Superior Courts of Common Law holds separate Nisi Prius Sittings; those after Hilary, Trinity, and Michaelmas Terms, at which the more important business is transacted, being limited by Statute to periods of twenty-four days. Constant complaints have been made of the arrears at these sittings, and of the unequal distribution of business between the three Courts. To remedy this, we propose that all causes to be tried at these Sittings should be entered upon a common list or lists. These Sittings should be held continuously throughout the legal year, by as many Courts as the amount of business to be disposed of may render necessary; and we think it expedient that all issues of fact in the Chancery Division of the Supreme Court, to be tried by a jury, should, unless the Court otherwise order, be entered for trial at these Sittings, and be tried accordingly. During the time allotted to the circuits we propose that at least two Nisi Prius Courts should sit continuously in the Metropolis.

The present Home Circuit is composed of five counties in the immediate neighbourhood of London. Between these counties and London there is constant railway communication, and we have no doubt that the legal business usually transacted at Assizes in those counties can be more conveniently disposed of in the Metropolis than at separate Assizes held for each county. In Surrey, especially, it is notorious that nearly all the causes tried at the Assizes are causes which would have been tried in the Metropolis, if there had been an opportunity of trying them at the previous Sittings. We also think that the criminal business for the counties composing the Home Circuit, which, if that Circuit were continued, would be disposed of at the Assizes, might with advantage be transferred to the Central Criminal Court. That Court has already jurisdiction over certain portions of the counties of Essex, Kent, and Surrey; and we think that any additional expense, that may be incurred by trying the prisoners from those counties at the Central Criminal Court, will be more than compensated by the speedy trial of prisoners, and the saving occasioned by the abolition of a separate Assize for each of the five counties, and of the Winter Assize. The extended area also, from which the jurors will be taken, will render the attendance of any particular juror, or class of jurors, less frequent, and the duties of the jurors on the whole less onerous.

We therefore propose that the counties composing the Home Circuit should, with Middlesex, constitute for all the purposes of trial, both in civil and criminal cases, one venue or county. As respects the City of London, we do not think it will be expedient, until the proposed new Courts of Justice shall have been erected, to disturb the existing arrangements for holding separate Sittings at the Guildhall for the trial of cases of a commercial character.

We think it desirable, as a general rule, that one Judge only, save in case of special need, should be appointed to attend at each Session of the Central Criminal Court.

CIRCUITS.

The arrangements for holding Sittings or Assizes in the other parts of England and Wales have been much considered by the Commission; but we are not prepared, without further deliberation, to submit to Your Majesty a detailed scheme on that subject.

We propose, however, to indicate briefly in our present Report the direction of the changes on this subject, which we are disposed to recommend, and some of the principles on which, we think, those changes should be founded.

Throughout England and Wales the extent of the venue depends entirely on ancient accidental divisions. All counties, including towns and cities which are counties of themselves, form separate venues. Power has been given by statute to try causes, arising within a county of a city or town, in the county adjoining by a jury of that county, the practical effect of which is, that where a county of a town is not an assize town, the jurors within such towns are exempted from serving altogether, and the burden of trying causes arising within those towns is thrown exclusively on the jurors of the adjoining county.

The necessity for holding Assizes in every county, without regard to the extent of the business to be transacted in each county, leads, in our judgment, to a great waste of judicial strength, and a great loss of time in going from one circuit town to another, and causes much unnecessary cost and inconvenience to those whose attendance is necessary or customary at the Assizes.

The distribution of a small amount of business among a large number of circuit towns is the cause of serious evil to the suitors. From the impossibility of ascertaining beforehand with accuracy the business likely to arise, the time allotted to some towns often proves insufficient, and complaints arise that the trial of causes is hurried, or that the parties are driven to dispose of their cases by reference, or otherwise, unless they submit to the loss and inconvenience of having their causes postponed until the next Assizes. The expense and trouble of bringing together judges, sheriffs, and grand jurors, and the time occupied in the preliminaries of an Assize, are the same at a small place, where there is but little business, as at a large one. The number of jurors, special and common, required to be in attendance, is much increased by the limited extent of the existing assize districts. If those districts were enlarged, a juror, who had once attended at the Assizes, would probably be relieved from future attendance for a considerable time.

We are, therefore, of opinion that the judicial business of the country should no longer be arranged and distributed according to the accidental division of counties, but that the venue for trials should be enlarged, and that several counties should be consolidated into Districts of a convenient size,—that such Districts should for all purposes of trial at the assizes, both in civil and criminal cases, be treated as one venue or county,—and that all counties of towns or cities should for the purposes of such Districts be included in an adjacent district or county.

In arranging the Circuits, we think that they should be so remodelled as to render the amount of business likely to be transacted on each Circuit as nearly equal as may be practicable; and in fixing the towns at which the Assizes should be held, we recommend that those towns should be chosen which are the most central,—with which there is the best and most rapid railway communication from all parts of the district,—and to which the inhabitants are most in the habit of resorting for the purposes of business. We may add, that after deducting the counties now forming the Home Circuit, we have reason to think that six Circuits for England and Wales would be found sufficient.

We think that in lieu of the ordinary Assize Commissions, one Commission only should be necessary for each Circuit; and that in place of the opening of the Commissions as now used, a notice should be inserted in the Gazette of such Commissions respectively, and of the days of holding the Assizes under them; and that all the Judges of the several Divisions of Queen's Bench, Common Pleas, and Exchequer should be in the Commission for each Circuit, and should be auxiliary to each other so far as may be necessary, and may be prescribed by General Orders of the Supreme Court.

We also consider it advisable that all local venues in civil actions should be abolished, leaving it to the Court or Judge to control the choice of the plaintiff in case an inconvenient venue should be chosen.

In order to lighten the business on Circuit, we think it expedient that the jurisdiction of Quarter Sessions should be extended to Burglary, and some other offences which we do not think it necessary here to define; and that a classification of offences triable at the Assizes and at Quarter Sessions should be made, and that all Magistrates be directed to make their committals in accordance with such classification, unless it appear to the Magistrate, and he state in his warrant of commitment, that the case appears to him to be of such importance as to be fit for trial at the Assizes.

A Proviso* similar to that which is now introduced into the Commissions for the Winter Assizes should, in our opinion, be invariably inserted in the Commissions for every Assize, limiting the duties of the Judges to the trial of persons committed to the Assizes only.

**Note.*—The form of the proviso above referred to is as follows :—

Provided always, and our will and pleasure is, that wherever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that the offence of any person or persons was intended to be inquired into and heard and determined at any sessions of the peace in the county aforesaid, it shall not be necessary for you our said justices hereby assigned, or for any of you, to inquire into or hear or determine such offences ; provided also, and our will and pleasure is, that whenever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that any prisoner in our said gaol has been committed thereto in order to his or her being tried at the next sessions of the peace for the said county, you our said justices hereby constituted, or any of you, shall not be required to deliver our said gaol of such prisoner, but shall be at liberty to order such prisoner to remain in our said gaol.

Juries.

We now proceed to the subject of Juries. Complaints have for some time been made, and more particularly by special jurors in the metropolis, of the inconveniences and inequalities of the present system. We believe that these complaints are well founded, and that they are chiefly attributable to the imperfect mode in which the jury lists are now framed, and to the numerous exemptions from serving which are now allowed.

We are confirmed in these views by the evidence recently taken by the Select Committee of the House of Commons. We do not propose to refer to this evidence in detail. It will suffice to notice the statement that for the whole county of Middlesex the number of special jurors is only 1,800, of whom it is stated that in consequence of the imperfect state of the list, at least one third are not available. It also appears that the total number of special jurors in the lists for the counties of Kent and Sussex are respectively only 400 and 197. It is manifest from these figures that the duty is not fairly distributed amongst those, who might be, and who, under an amended state of the law, ought to be duly qualified to serve. The existing state of the special jury lists is however not wholly due to the careless manner in which they are now framed and revised, nor to the existing exemptions from service on juries; but is in some measure attributable to the vague definition of "merchant" and "esquire" as qualifications for special jurors. When it is remembered that in each parish the duty of designating the common and special jurors devolves upon the churchwardens and overseers, it can hardly excite surprise if complaints are made that in some places those competent to serve are omitted from the list, whilst in others the designation of "merchant" or "esquire" is given to jurors, who have not those special qualifications which it is desirable that special jurors should possess.

The defects of the present system appear to be particularly felt in Middlesex, where the duties of special jurors have recently, from various causes, been greatly increased. We allude particularly to the establishment of the Courts of Probate and Divorce; to the growing tendency (doubtless arising in great measure from the increased facilities of communication) of trying in London causes which arise in different parts of the country; and to the numerous cases in which special juries are now summoned to assess compensation for property taken for the purposes of public undertakings.

We think that the burden thus thrown upon special jurors might, without prejudice to the suitors, be materially lessened by altering and extending the qualification of special jurors, and that, on the other hand, the qualification of other jurors should be somewhat raised. If the constitution of common juries is improved, it is not improbable that the resort to a special jury will be less frequent.

In the metropolis a rateable value as low as 30*l.* qualifies a juror, and in the country 20*l.* In Wales the qualification is three fifths of that in England. Having regard to the changes which have taken place in the value of property since these amounts were fixed, we think that the value of the rated house which qualifies the householder should be raised to 50*l.* in parishes wholly or in part within any town containing, according to the census next preceding the preparation of the jury list, 20,000 inhabitants and upwards, and to 30*l.* in other places. We think that the qualification in Wales should be the same as in England. In other respects we think that the qualification of a juror should be as at present.

We are of opinion, that aliens having been resident in this country for 10 years, if possessed of the requisite qualification, should be liable to serve as jurors, and that alienage should not be ground of challenge. We further recommend that the right of an alien to claim a trial by a jury de medietate linguæ should be abolished.

Our attention has been called to the numerous grounds upon which persons qualified to serve as jurors are now entitled to exemption. We recommend that all exemptions on the ground of charter, prescription, or otherwise than by statute, should be abolished, and that the list of exemptions should be narrowed as far as possible, the exemptions being limited to persons whose avocations render them undesirable as jurors, or whose duties are of such a character, and would be so far interrupted by their serving on juries, as to occasion practical detriment to the public.

We think that the special jurors should consist of those at present qualified, and such as occupy a private dwelling house rated at 100*l.* in a town of 20,000 inhabitants and upwards, or elsewhere at 60*l.*, or who occupy premises other than a farm rated at 200*l.*, or a farm rated at 500*l.* By this extension of the qualification of special jurors, we think that their duties would be distributed over a much larger proportion of the whole body of jurors, without lessening that amount of intelligence, which the suitors naturally expect when they have resort to a special jury.

On the other hand, we are of opinion that persons qualified as special jurors should continue on the general panel as common jurors, both in civil and criminal cases, and should not be exempted from serving on common juries as at present is the practice. This practice of excluding special jurors from the list of common jurors is inconsistent with the present state of the law; and it is remarkable that it should have been continued, notwithstanding the pointed manner in which attention has more than once been called to the subject. The Common Law Commissioners appointed in 1850, in their second Report, after recommending that the qualification of jurymen in the country should be raised (a recommendation which has not hitherto been acted upon), stated "that on every trial there should be an admixture of jurymen of the class from which "the special juries are now taken. This is indeed now the law, though in practice the "names of persons qualified to be special jurors are not placed on the common jury "panel. There is every reason why jurors of the higher class should assist in the "administration of justice to the same extent as those who constitute the common "juries. We think the higher class of jurors should bring the assistance of their more "cultivated minds and superior intelligence to the decision of cases which, though they "may not admit of the additional expense attendant under the present system on "having a special jury, may not be the less important to the parties whose interests "are involved. At the same time it should be understood that we do not propose to "abolish the right, which now exists, of having a special jury as at present appointed. "What we recommend is, that the general jury panel should be made up indiscriminately "from all persons qualified to serve on either jury."

The same learned Commissioners in their third Report, issued after an interval of several years, said: "We think it right to avail ourselves of this opportunity to invite "renewed attention to our former observations respecting the constitution of Juries. "More especially we would urge the consideration of that part of our recommendations, "which relates to securing the attendance on common juries of the class of persons, "who now serve exclusively on special juries, with a view to the improvement of the "former by the admixture of persons of higher education and intelligence. We are "strongly persuaded that a very great improvement would by this means be effected "in the constitution of Juries; and as we do not propose to do away with the right "of parties to resort to a special jury, or to deprive special jurors when serving, as "such, of the additional remuneration which they are in the habit of receiving, we "can see no ground why the liability of such persons to serve on common juries, which "already exists in law, though it is not required in practice, should not be enforced."

In these views we entirely concur.

We now proceed to refer shortly to the preparation and revision of the jury lists. It is clear that the lists should be prepared with more care than at present. The recommendations of the Select Committee of the House of Commons, in their Report of 1868, as to, on the one hand, paying the overseers their expenses, and on the other making them liable to a penalty for negligence, seem to us well worthy of consideration. The lists should state after the name of each person, who, in the judgment of the overseers, is qualified as a special juror, that he is so, and the nature of the qualification, and we recommend that no person, whose name is in the jury book as a juror, should be excused from attendance on the ground of any disqualification or exemption not claimed by him at or before the revision of the list, and we would suggest that a notice to this effect should be printed at the bottom of the list.

We think that the revision of the jury lists should be by the justices at petty sessions, as at present, and that the justices should certify that they have examined the list, and that the same is, to the best of their knowledge and belief, a true and proper list of the special and common jurors, and that the jury book should be made up as at present from the lists thus revised. The decision of those who revise the lists as to the qualification of a special juror should as respects that list be final.

With the view of lessening the inconveniences, which result from deaths and removals, we recommend that the overseers should be required at intervals of three months to send to the office of the under sheriff a list of all persons on the list who have died or left the district, and that it should be the duty of the under sheriff to amend the list accordingly.

In order to secure the impartial summoning of Juries, directions should be given to the sheriffs and summoning officers not to summon a second time any person who has been summoned as a juror, so long as there are a sufficient number of jurors, who have not been summoned since he was. The performance of this duty should be enforced by a penalty, but no failure in its performance should form a ground of challenge, or of excuse to a juror summoned and not attending.

We recommend that in London and Middlesex the special jurors should be taken from a panel in like manner as they now are at the assizes, but the present power to order a special jury on the old system should be retained.

It is further, we think, important that either party should in all cases have the right to exclude from the jury as many as six names, or by leave of the judge a greater number. This right to be exercised by delivering to the associate, immediately before the cause is called on, a list of the names objected to.

In cases where a full available special jury are not in attendance, a tales should not be demanded as of right, but should be allowed by leave of the judge or by consent. In case of the non-attendance of a full special jury, the judge should have power to direct the trial to proceed with not less than nine special jurors, or to direct additional jurors qualified to act as special jurors to be obtained from another panel or otherwise.

We think that all special jurors summoned, and not in attendance when called, should pay, as of course, unless excused, a fine of 10*l.*, and that such fine should not be remitted or reduced except for cause shown. We further think that the judge should have power to impose an additional fine, and to order such additional fine to be applied in or towards the payment of any costs occasioned by the non-attendance of the jurors.

In the event of the death, illness, or default of attendance of any jurors during any trial, civil or criminal, the judge should have power, if he thinks fit, to allow the trial to proceed, and the verdict of the remaining jurors should be a sufficient verdict.

The question of remuneration to jurors appears to us to be one of some difficulty. It would manifestly be impracticable to fix an amount, which would adequately compensate special jurors for their loss of time. On the other hand it is important that the remuneration to common jurors should not be sufficient to make them desirous of serving for the purpose of obtaining it. We think that in fixing the remuneration regard should be had to the service being one which it is the duty of the jurors to render, and which is in some measure analogous to other public duties which are necessarily performed gratuitously. We think that the remuneration should be by day, and not by the cause tried, and should be confined to jurors actually serving. If remuneration is given upon this principle, it will be necessary, in order to provide a fund for the purpose, to fix a Court fee to be paid by the suitors in each cause.

The practice of depriving the jury of fire should, in our opinion, be discontinued; and we think that the judge should have power to allow reasonable refreshment to be supplied to them.

It is desirable that the Supreme Court should be empowered by General Orders to make rules as to the number of jurors to be summoned, and the duration of their attendance, and generally as to the mode of summoning jurors.

Appeals.

We now come to the important subject of Appeals. It follows, from the principles of our preceding recommendations, that the system of appeal from all the Divisions of the Supreme Court exercising jurisdiction in the first instance ought to be made, as far as possible, simple and uniform.

At present, the Appeal from orders or decrees made by the Judges of First Instance, in the Court of Chancery, is either to the Court of Appeal in Chancery, or to the House of Lords, at the option of the appellant; there is also an appeal to the House of Lords from the Court of Appeal in Chancery. Appeals and Errors from the Courts of Queen's Bench, Common Pleas, and Exchequer must in all cases go to the Court of Exchequer Chamber, from whence a further Appeal, or Error, as the case may be, lies to the House of Lords. From the Court of Probate Appeal also lies to the House of Lords. From the decrees and orders of the Judge Ordinary of the Divorce Court an appeal lies to the Full Court, consisting of the Judge Ordinary and two Common Law Judges; and also in certain cases from the Full Court, or from the Judge Ordinary exercising the powers of the Full Court, to the House of Lords. From the Court of Admiralty, the sole appeal is to your Majesty in Council, or, practically, to the Judicial Committee of the Privy Council.

Upon the constitution of the House of Lords, considered as a Court of Appeal, we do not consider it to be within the scope of our Commission to offer any other remarks than that it unavoidably impairs the efficiency of the Court of Chancery during the session of Parliament, by withdrawing the Lord Chancellor for the whole of four days in every week from his own Court. Upon the constitution of the Judicial Committee of the Privy Council we also abstain from saying more, than that it has been, for

many years, found impossible to discharge the appellate duties of that body without withdrawing one or more Judges (often the Lords Justices or the Master of the Rolls, sometimes the Judge of Admiralty or Probate, or one of the Chiefs of the Courts of Common Law) from their respective Courts, to the great inconvenience of suitors, and delay of business in those Courts, during the considerable, and continually increasing. periods of time occupied in every year by the transaction of Privy Council business, Any arrangements, therefore, which may tend to relieve the House of Lords, or the Judicial Committee, from any appeals which now go there will so far add to the strength of the Supreme Court.

The Court of Appeal in Chancery, consisting of the Lord Chancellor and the Lords Justices, is in practice generally divided into two Courts, in one of which the Lord Chancellor presides alone, in the other the Lords Justices; and, during the Session of Parliament, the Lord Chancellor's Court is closed, as has been already stated, except for two days in the week. When the Lord Chancellor happens to be less conversant with equity business than the Lords Justices, his decision, sitting alone in appeal from a Court of Equity, cannot be so satisfactory to the suitors, as if he had the benefit of their assistance; and when the Lords Justices, as has sometimes happened, differ in opinion, the appeal to them necessarily fails, the judgment of the Court below is affirmed, and a further appeal to the House of Lords frequently results. Cases of more than usual importance are, indeed, sometimes reserved for hearing, or are directed to be reargued, before the Full Court of Appeal; but the pressure of business, and the engagements of the Lord Chancellor for so great a portion of the year in the House of Lords, confine within very narrow limits the time which can be allotted to sittings of the Full Court.

The Court of Exchequer Chamber is formed by a combination of all the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, under such arrangements, that errors and appeals from each of those Courts are determined by Judges taken from the other two. The inconveniences of this system are, in practice, very serious. All these Judges having, during nearly the whole year, pressing demands upon their time for other purposes, are only able to devote a very limited number of days after each term to the hearing of appeals and errors; and each of these periods requires to be broken up into three parts, and the constitution of the Court to be three times changed, in order to dispose of a portion of the appeals and errors from each of the Courts of First Instance. The effect generally is so far to reduce the number of Judges, who are able to attend in the Court of Exchequer Chamber, as, in case of any difference of opinion, to render it possible that the majority of opinions, in the Court of Appeal and the Court of First Instance taken together, may be overruled by the minority,—a result which, as the Judges of Appeal are not appointed or selected specially to act as such Judges, and the Judges who have been overruled to-day may to-morrow themselves sit in appeal from some decision of the Judges who have taken part in overruling them, is eminently unsatisfactory. The same causes also lead, in many cases, to great and unavoidable delays in the disposal of Common Law errors and appeals.

The constitution of the Full Court of Divorce, by the addition of two Judges of the Common Law Courts, withdrawn *pro hâc vice* from their other duties, and associated with the Judge Ordinary, is liable to some of the same objections.

The conditions on which Appeals or Errors can be brought from the different Courts are also widely different.

To the Court of Appeal in Chancery and to the House of Lords from the Court of Chancery, an appeal lies from all Orders and Decrees, whether interlocutory or final, of the Courts below, and upon all questions, whether of fact or of law; except that the verdict of a Jury, or of a Judge exercising the functions of a Jury, can only be impugned by a motion for new trial. The jurisdiction of the Court of Appeal in Chancery, or of the Master of the Rolls or a Vice-Chancellor to rehear his own decree, a practice which is also allowed, may be excluded by a formal procedure called Enrolment, which takes place at the instance of any party, practically at any time within five years from the date of the decree or order enrolled, if nothing has been done in the meantime by the suitor with a view to bring the matter before the Court of Appeal. After this no error in the decree or order enrolled, except mere clerical mistakes, can be corrected by the Court of First Jurisdiction, or by the Court of Appeal in Chancery, without a new suit for that purpose, called a Bill of Review. The same formality, which shuts the door of the Court of Appeal in Chancery, opens to the dissatisfied suitor that of the House of Lords, which does not receive appeals from

decrees or orders of the Court until after they have been enrolled. Both the Court of Appeal in Chancery, and the House of Lords, proceed upon the same record and evidence, which were before the Court from which the appeal is brought; and the Court of Appeal in Chancery, both in what are technically called Rehearings of decrees and decretal orders, and upon appeal petitions or motions, has all the powers possessed by the Court of First Instance, and can therefore allow amendments of the record, and in some cases may receive new or further evidence; which is contrary to the practice of the House of Lords.

From the Courts of Common Law to the Exchequer Chamber, Error lies in certain cases, and Appeal in others. Error is brought, as of right, on matter of law apparent on the record, on judgments on demurrers, on bills of exceptions for the improper reception or rejection of evidence, or for misdirection by the Judge at the trial, on special cases, on judgments *non obstante veredicto*, and for arrest of judgment. Appeal lies, as of right, from decisions upon points of law reserved at a trial. It also lies, but not without leave of the Court, unless the Judges differ, on motions for new trial on the ground of improper reception or rejection of evidence, or of misdirection by the Judge. No judgment, rule, or order is appealable which does not fall within one or other of these classes of cases. From all judgments of the Court of Exchequer Chamber, a further Appeal or Error, as the case may be, lies to the House of Lords.

Among the inconveniences of this system are the following:—Error cannot be brought from any interlocutory judgment, *e.g.*, a judgment allowing a demurrer, before the final determination of all issues of law and of fact joined upon the record. The point of law decided on the demurrer may be sufficient, if the judgment stands, to determine the whole controversy between the parties; yet if, as is commonly the case, issues of fact, as well as law, have been joined in the pleadings, it is necessary to go through the expense and delay of trying all those issues, though according to the judgment on the demurrer they are wholly immaterial, in order to get into the Court of Error. As to Bills of Exceptions, the rule is that they must be tendered at the time of trial, and before verdict given, excluding all opportunity for deliberate consideration, and giving occasion to difficulties as to the proper mode of stating the terms, or substance and effect, of the Judge's ruling; no bill of exceptions being admissible unless signed by the Judge, and no proof of his ruling, extrinsic to the bill of exceptions itself, (*i.e.*, by shorthand note or otherwise,) being allowed. The practice has been to hand in a hasty and imperfect note at the trial, leaving the bill of exceptions itself to be afterwards agreed upon by the parties, or settled by the Judge. In some cases it is found difficult, in others impossible, to come to any agreement or settlement, and, whenever any difference arises, it leads to great delay and expense. The cases are so few in which the points of law really intended to be raised can be satisfactorily taken by this form of proceeding that it is of little use. The convenient mode, and that generally adopted, of raising those points, except when the parties agree to have a special case stated, a practice attended with its own inconveniences, is either by reserving them at the trial, which depends on the leave of the Judge, and the consent of the parties, or by motion for a new trial. The power of appeal when the latter mode is adopted, if the Court gives a unanimous judgment, is not of right, but depends upon the will and discretion of the Court.

When Appeal is brought, the Court of Exchequer Chamber does not proceed simply upon the materials which were before the Court below, but a Case must be made up between the parties, which must be settled by the Judge if the parties differ; and, as such difference often happens, this is apt to lead to considerable expense and delay.

Appeals lie to the House of Lords, as of right, from all final Orders or Decrees of the Court of Probate, whether depending on questions of law or of fact only, and from all interlocutory decrees or orders of that Court, by the leave of the Court, but not otherwise.

In the Divorce Court, every decision of the Judge Ordinary, whether on law or on fact, is subject to an appeal to the Full Court, whose decision is final, except in cases of dissolution of marriage, nullity of marriage, or declaration of legitimacy, in which excepted cases only an appeal lies from sentences and final judgments of the Divorce Court to the House of Lords.

In the Court of Admiralty, as in the Court of Probate, all final sentences are appealable as of right, and all interlocutory judgments are appealable by the leave of the Court only.

The rules as to the time for appealing, in the different Courts, are also different.

For appeals and rehearings in Chancery, a period of five years from the date of the decree or order appealed from is allowed, after which the leave of the Lord Chancellor

or Lords Justices is necessary, and such leave may be given at any time, but will only be given if it shall "appear, under the peculiar circumstances of the case, to be just "and expedient."

For appeals to the House of Lords from the Court of Chancery, two years from the date of the enrolment of the order appealed from, and thenceforth until the end of a fortnight after the beginning of the next session of Parliament, are allowed; and when a final decree is appealed from, all prior interlocutory orders in the same cause, though enrolled for more than the prescribed period, may be included in the appeal.

At Common Law, six years from the date of final judgment are allowed for bringing error to the Exchequer Chamber, and a like period of six years for bringing error from the Exchequer Chamber to the House of Lords. In cases of appeal, as distinguished from error, in the Common Law Courts, notice of appeal must be given within four days after the decision appealed from, unless the time is enlarged. When such notice is given, as for want of the opportunity of full consideration it generally is, no time is limited within which the party must proceed to prosecute his appeal.

In the Probate Court application for leave to appeal from an interlocutory decree or order must be made within a month after the delivery of the decree or order, or within such enlarged time as the Court may direct; and it may be doubtful whether any time is limited for appealing from Final Decrees or Orders.

In the Divorce Court, the appeal from the Judge Ordinary to the Full Court must be filed within three months from the date of the decree appealed from; and that to the House of Lords, whether from the Full Court or from the Judge Ordinary, within one month.

Appeals from the Court of Admiralty must be founded either on notice given to the Registrar immediately after the delivery of the judgment, or upon a declaration, called a Protocol of Appeal, made before a notary and witnesses within fifteen days, and must be prosecuted by presenting a petition of appeal to your Majesty in Council within one year from the date of the sentence or decree appealed from.

As to security for the costs of appeal:—

In the Court of Chancery none is required beyond a deposit of 20*l.* with the Registrar, when the petition is for rehearing of a decree or decretal order. Upon interlocutory appeals no deposit is made. In the Courts of Common Law, every appellant (in an appeal technically so called) and every defendant in an action who brings error is required to give substantial bail to pay costs; but a plaintiff who is also plaintiff in error gives no security. In the Courts of Probate and Divorce no security for costs is taken, but the general orders of the House of Lords require all appellants to that tribunal to enter into their own recognizances, without sureties, for 400*l.* Appellants from the Court of Admiralty, if resident out of the jurisdiction of the Court, may be required to give bail in 300*l.*; if within the jurisdiction, they give no security.

In the Court of Chancery and the Probate Court an appeal does not operate as a stay of execution unless the Court, upon a special application, so directs. In the Divorce Court it does, practically, so operate. In the Courts of Common Law appeal or error operates always as a stay of execution as soon as security is given. In the Court of Admiralty an appeal is followed, as of course, by an inhibition, which has the same effect.

Court of Appeal.

For these various and discordant systems of appeal we recommend the substitution of the scheme embodied in the following suggestions:

Constitution of Court.

First, we propose that in the place of the Court of Exchequer Chamber, and of the Court of Appeal in Chancery, both which Courts, as now constituted, would cease to exist, there should be established, as a part of the Supreme Court, a Court of Appeal, consisting of—

The Lord Chancellor,
The Lords Justices,
The Master of the Rolls, and
Three other permanent Judges, with
Three of the Judges of the Supreme Court to be nominated annually by the Crown;

an additional Vice-Chancellor being substituted, as a Judge of First Instance, for the Master of the Rolls. The Court of Appeal thus constituted should be empowered to sit either as a Full Court, or in Divisions, but the number of Judges sitting together in any Division ought never to be less than three. The Judges of the Court, other than the nominated Judges, should always form a majority of the Court.

We propose further, that to this Court an appeal should lie from all judgments, decrees, rules, and orders, in suits or proceedings not strictly criminal, of any division or Judge of the Supreme Court, with certain exceptions which we shall afterwards specify. It may hereafter deserve consideration, after experience of the working of the Court thus constituted, whether its decisions may not be made final, unless leave to appeal from them be given, either by the Court itself, or by the House of Lords. In the meantime, we recommend that there should be a right of appeal to the House of Lords.

A direct appeal to the House of Lords, without going through the Court of Appeal, might, we think, be allowed in all cases in which an appeal on matter of law would lie to the Court of Appeal, if the respondent consents to that course being taken, but not otherwise.

The limitations or exceptions to which we think the right of appeal ought to be subject are the following: Judgments, Decrees, or Orders founded upon and applying the verdict of a jury, or the verdict of a Judge discharging the functions of a jury ought not to be appealable, except upon matter of law. Interlocutory orders, if made by any division of the Supreme Court, consisting of three or more Judges, should not be appealable, except in case of difference of opinion among the Judges, or by special leave of the Court; and, if made by any Division or Judge with respect to any question of procedure or practice, as to which the Court or Judge had power to make the order, should be appealable only under such regulations as may be made by General Orders. As a general rule, no appeal should be allowed as to costs only.

The time for appealing from interlocutory orders made in the progress of a suit, before the final decision upon the merits between the parties, ought to be regulated by General Orders. In all other cases a fixed period, not exceeding six months from the time when any judgment, decree, rule, or order is made or entered upon the record, should, we think, be allowed for appealing against it. These rules, as to the time for appealing, should apply both to appeals to the Court of Appeal, and to appeals to the House of Lords; and the office of the Clerk of the Parliaments ought to be open for the reception of appeals at all times of the year, whether Parliament be or be not sitting.

All proceedings in error and bills of exceptions should be abolished; and every appeal to the Court of Appeal should be brought by notice of motion, by way of appeal, in a summary way, without any petition or formal procedure. No enrolment of any judgment, decree, rule, or order should be necessary in order to enable any party to appeal therefrom to the House of Lords; and every appeal to the House of Lords should be brought by a petition in a short form, stating the title of the cause or matter, with the names of the parties thereto, and the date of the order appealed from, and when the same was made or entered on the record; and also, who are the respondents to the appeal, and whether a general reversal, or a variation in any and what particulars, of the order appealed from is sought, but without setting out at length any of the proceedings.

The right of appeal should, we think, as a general rule, be conditional on substantial security being given by the appellant for the costs of the appeal. Inasmuch, however, as there may be cases to which this rule could not be applied without inconvenience or injustice, we think, that both the nature and the amount of such security, and the regulations according to which it may be required or dispensed with, are subjects which may properly be dealt with by General Orders of the Court.

No appeal should operate as a stay of execution, or of proceedings under the order appealed from, unless the Court, or a Judge of the Court, from which the appeal is brought, or the Court of Appeal, shall so order. But such stay of execution should be granted, as of course, when the order under appeal is for a money payment, on the terms of payment of the money into Court, or of security being given to the satisfaction of the Court.

With respect to the hearing of appeals, we would propose, that the following Rules should be established and made applicable both to the Court of Appeal and to the House of Lords.

Every appeal should be deemed to be in the nature of a rehearing, and the Court of Appeal should have power, if the justice of the case shall appear so to require, to allow any pleading or any special case to be amended, or any supplemental pleading or statement to be added to the record; or, upon any question of fact, to admit further evidence. Upon appeals and motions for new trial, proof of a Judge's ruling by a shorthand writer's notes ought, in our opinion, to be received. Upon the hearing of the appeal the Court should have jurisdiction over the whole record, and no interlocutory order, from which there has been no appeal, should operate so as to bar or prejudice a decision upon the merits.

The Court should also have power, upon the hearing of any appeal, to vary or alter the order under appeal in favour of the respondent, in any manner which may appear proper to do complete justice between the parties, as if the respondent had presented a cross appeal, complaining of any part of the order by which he may deem himself to have been aggrieved.

If these recommendations are adopted, we think that there should be no rehearing of any cause or matter before the Court by which it was originally heard, except by leave of the Court, nor, unless by consent of all parties, after the expiration of the time limited for appealing; and that Bills of Review for error apparent on the record should be abolished. Nothing, however, in these rules should take away or abridge the power of the Court to rectify any error which may have occurred in drawing up any judgment, decree, rule, or order.

We shall proceed, with due diligence, to consider the other matters embraced in Your Majesty's Commission; and we humbly submit to Your Majesty's gracious consideration this our First Report.

CAIRNS. (L.S.)
HATHERLEY. (L.S.)
W. ERLE. (L.S.)
JAMES PLAISTED WILDE. (L.S.)
*ROBERT J. PHILLIMORE. (L.S.)
GEORGE WARD HUNT. (L.S.)
HUGH C. E. CHILDERS. (L.S.)
W. M. JAMES. (L.S.)
†G. BRAMWELL. (L.S.)
COLIN BLACKBURN. (L.S.)
‡MONTAGUE SMITH. (L.S.)
R. P. COLLIER. (L.S.)
‡JOHN DUKE COLERIDGE. (L.S.)
ROUNDELL PALMER. (L.S.)
JOHN B. KARSLAKE. (L.S.)
J. R. QUAIN. (L.S.)
H. C. ROTHERY. (L.S.)
§ACTON S. AYRTON. (L.S.)
WILLIAM G. BATESON. (L.S.)
JOHN HOLLAMS. (L.S.)
FRANCIS D. LOWNDES. (L.S.)

THOS. BRADSHAW, Secretary.
25th March 1869.

---

* Agreeing with the general spirit and with most of the recommendations of the Report, I have subscribed it.

There are two subjects on which I desire to guard the expression of my opinion:

(1.) I think it is not expedient to destroy the special jurisdiction of the High Court of Admiralty. That Court has always administered in peace and war maritime international law. To no other Court has the Crown ever granted a commission of prize; and even before the issue of such commission, it has, in the opinion of Lord Stowell, an inherent jurisdiction in these matters. I may observe that the forms of pleading now in use in the High Court of Admiralty are as nearly as possible those which this Report recommends to be generally adopted by all Courts.

Digitized with financial assistance from
Shri Brihad Bhartiya Samaj
on 24 February, 2020

(2.) I think that the want of power in the Commission to consider the composition of the Final Court of Appeal has been unfortunate, because it has practically excluded from our consideration—

(*a.*) Whether it be expedient that two Final Courts of Appeal, namely, the House of Lords and the Judicial Committee of the Privy Council, should still continue:

(*b.*) Whether, if so, the composition of either or both should remain unaltered.

Yet the consideration of both these questions ought, in my judgment, to have preceded, and would perhaps have considerably modified the suggestions for the intermediate Court of Appeal made in this report. I think it also very doubtful whether that Appellate Court should be composed for the most part of Judges exercising appellate jurisdiction only.

ROBERT J. PHILLIMORE.

† CIRCUITS: I cannot concur in this recommendation to its full extent.

G. BRAMWELL.

‡ We are not able to concur in the recommendation that several counties should be consolidated for assize purposes to the extent indicated in the Report. Our general view is, either that the present system of holding assizes, which is based on the existing divisions of counties, and which brings justice reasonably near to the homes of suitors, witnesses, and jurymen, should, with some modifications, be retained; or that the present system of Circuits should be altogether discontinued, and Provincial Courts established with assigned districts, having Judges who should go frequent circuits to convenient places within such districts; and with appeal from the Provincial Courts in certain cases to the Metropolitan Courts of Appeal.

MONTAGUE SMITH.
JOHN DUKE COLERIDGE.

§ I desire to record my opinion, that the following questions should be further considered:—

Whether all proceedings should not be commenced and prosecuted in the County Courts, unless it appears from the nature of the case that it is proper to remove it into the Supreme Court.

Whether it is desirable to allow such facilities for appealing, and repetition of appeals.

Whether, having regard to the unequal means of litigants, the changes proposed might not render it desirable to establish a new system of legal remuneration, and to limit the claims of suitors against each other for costs.

Whether it might not be desirable to substitute for the discretion of the Judges in respect of costs certain rules of positive application.

Whether the qualification of jurymen should not rather be lowered than increased.

Whether sufficient consideration has been given to the other elements in the administration of the law beyond that of excellence of judicial decision, namely, the time of the suit, the expense to the suitor, and the influence of the administration of justice on the social and political condition of the people.

Whether the House of Lords, if it is to continue a Court of Appeal, might not be rendered efficient for the purpose by legal peerages conferred on Judges of a certain standing, so as to make the Bench independent of the pleasure of the Crown, and by constituting a permanent Committee of such Peers, on the principle of the Judicial Committee of the Privy Council.

ACTON S. AYRTON.